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No. 80-1239

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Appellant,

v.

WILLIAM M. GIBBONS, Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; HENRY CROWN, et al.; THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL P. GOLDSCHMIDT, Secretary of Transportation,
Appellees.

On Appeal From The United States District Court For The Northern District Of Illinois, Sitting As A Railroad Reorganization Court

MOTION TO CONSOLIDATE AND AFFIRM

NICHOLAS G. MANOS
332 South Michigan Avenue
Chicago, Illinois 60604
(312) 435-7494

JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

RUDNICK & WOLFE
30 North LaSalle Street
Chicago, Illinois 60602
(312) 368-4000

MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604
(312) 782-0600

NICHOLAS G. MANOS
Attorney for William M. Gibbons, Trustee of Chicago, Rock Island & Pacific Railroad Company

ALBERT E. JENNER, JR.
DANIEL R. MURRAY
BARBARA S. STEINER
DEBORAH H. BORNSTEIN
RANDALL E. MEHRBERG
Attorneys for Henry Crown, et al.

TERRY F. MORITZ
MICHAEL C. KIM
Attorneys for The First National Bank of Chicago, as Indenture Trustee

MILTON L. FISHER
HAROLD L. KAPLAN
Attorneys for Continental Illinois National Bank and Trust Company of Chicago, as Indenture Trustee

February 18, 1981

ISSUES PRESENTED FOR REVIEW

(1) Whether the Rock Island Act's employee protection scheme violates the fifth amendment to the United States Constitution through its uncompensated taking of the private property of the Rock Island estate for a purported public purpose and without due process of law.

(2) Whether the Rock Island Act's employee protection scheme violates the due process, separation of powers and uniformity in bankruptcy provisions of the United States Constitution by its summary taking of the property of the Rock Island estate.

(3) Whether the oblique reference to the Tucker Act added by the Staggers Act amendments cures the constitutional defects of the Rock Island Act.[1]

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[1]Parent Companies, Subsidiaries and Affiliates of the appellees are listed in Appendix C, *infra*.

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WILLIAM M. GIBBONS, Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; HENRY CROWN, et al.; THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL P. GOLDSCHMIDT, Secretary of Transportation,

Appellees.

On Appeal From The United States District Court For The Northern District Of Illinois, Sitting As A Railroad Reorganization Court

MOTION TO CONSOLIDATE AND AFFIRM

William M. Gibbons, Trustee of the Chicago, Rock Island and Pacific Railroad Company, Continental Illinois National Bank and Trust Company of Chicago and The First National Bank of Chicago, as Indenture Trustees, and Henry Crown, et al., substantial holders of first mortgage bonds, income debentures and common stock of the Rock Island ("appellees"), pursuant to Rules 16 and 42 of the Rules of the Supreme Court of the United States, respectfully request that this Court note probable jurisdiction of this appeal, consolidate this appeal with the appeal pending in this Court in No. 80-415, and affirm the rulings of the reorganization court that are the subject of these appeals on the ground that the decisions below were so obviously correct as not to warrant further review.

PRELIMINARY STATEMENT

This appeal arises from the order entered by District Judge Frank J. McGarr on October 15, 1980, in which he refused to vacate his injunction of June 9, 1980. That injunction is the subject of the appeal in *Railway Labor Executives' Ass'n v. Gibbons*, No. 80-415, pending before this Court. By his June 9, 1980 order, Judge McGarr enjoined the implementation of the employee protection scheme of the Rock Island Transition and Employee Assistance Act, 45 U.S.C. § 1001, *et seq.* ("Rock Island Act"), on the ground that it would work an unconstitutional taking of the Rock Island estate and violate its due process rights. Judge McGarr's refusal on October 15 to vacate his June 9 injunction was based upon his finding that the Staggers Rail Act amendments to the Rock Island Act, P.L. No. 96-448, § 701 (Oct. 14, 1980) ("Staggers Act"), merely reenacted, with only cosmetic changes, the unconstitutional scheme contained in the original Act.

Appellees respectfully urge this Court to consolidate this appeal with the appeal pending in No. 80-415 in order to cut through the procedural morass created by Congress' improvident legislation and RLEA's repeated appeals, to achieve judicial economy, and to avoid the risk of inconsistent adjudications. Both appeals filed by RLEA turn upon the same issue—whether Congress may impose upon a railroad in liquidation a new labor protection obligation. The basic issue on appeal in both cases is whether the labor protection scheme imposed by the Rock Island Act and reenacted by the Staggers Act is constitutional. The only new issue raised by this appeal is whether the oblique reference to the Tucker Act in the Staggers Act cures the Rock Island Act's constitutional deficiencies.

Appellees submit that Judge McGarr was entirely correct in his determination that the Rock Island Act's imposition of a new $75,000,000 labor protection obligation on the bankrupt Rock Island is unconstitutional. Appellees maintain that Judge McGarr was also correct in ruling that the oblique reference to the Tucker

Act in the Staggers Act amendments does not cure the unconstitutionality of the statutory scheme. Appellees therefore respectfully request this Court to note probable jurisdiction of this appeal, consolidate this appeal with the appeal in Case No. 80-415, and summarily affirm the decisions of the district court and the court of appeals that the basic Rock Island Act employee protection scheme, even as amended, is unconstitutional.

STATEMENT OF FACTS

This Court is no stranger to the facts of these proceedings.[2] On June 9, 1980, Judge McGarr enjoined the implementation of the employee protection provisions of the Rock Island Act, finding that the $75,000,000 obligation to fund a wholly new employee protection scheme worked an unconstitutional taking of the property of the Rock Island estate. RLEA filed a notice of appeal of this order to this Court on June 11, 1980, pursuant to 28 U.S.C. § 1252. On June 20, 1980, after further briefing and oral argument, Judge McGarr denied a motion to reconsider his injunction. The next day, RLEA filed its application for a stay of the injunction before Justice Stevens, as Circuit Justice for the Seventh Circuit. Justice Stevens denied the RLEA's motion. The full Court sustained his denial on June 28, 1980.[3] RLEA's appeal of the reorganization court's order is presently pending in this Court in Case No. 80-415.

[2]Because of the provisions affecting judicial review contained in the Staggers Act, and because of the successive appeals and applications for stay filed with this Court by RLEA, this Court has already received a number of filings concerning the underlying facts and the legal questions raised by the Rock Island Act and the Staggers Act. Appellees respectfully refer the Court to Appellee's Motion to Affirm, *RLEA v. Gibbons*, No. 80-415 (U.S., *motion filed* Dec. 17, 1980) (hereinafter, "Motion to Affirm"), for a more detailed discussion of the statutory scheme, the facts, and the legal issues presented by the Rock Island Act and the Staggers Act.

[3]*RLEA v. Gibbons*, 100 S. Ct. 2668 (Stevens, Circuit Justice, June 28, 1980) (opinion denying stay application); 100 S. Ct. 3057 (July 2, 1980) (order denying stay application) (No. 80-415).

Congress was displeased with the judicial branch's protection of the Rock Island estate from an unconstitutional taking but was still unwilling to appropriate public funds to pay for labor protection. Therefore, on September 29, 1980, Congress passed amendments to the Rock Island Act as part of the Staggers Act. The amendments reenacted, without substantial alteration, the same scheme for the imposition of a new $75,000,000 labor protection obligation on the Rock Island estate which was contained in the original Act. *Compare* Section 701(b)(1) of the Staggers Act with Section 106 of the Rock Island Act.

While the Staggers Act corrected some procedural defects in the original Act,[4] Congress' only effort at curing the unconstitutionality of the actual taking was limited to the addition of Section 124(c) to the Rock Island Act. This section provides that "nothing in this Act . . . shall limit the right of any person to commence an action in the United States Court of Claims under . . . the Tucker Act".

Based upon the proposed Staggers Act amendments to the Rock Island Act, on October 7, 1980, RLEA requested Judge McGarr to vacate his earlier order declaring the Act unconstitutional. On October 15, 1980, after the Staggers Act had become law and after the submission of additional briefs and oral argument, Judge McGarr found that the amendments failed to cure the Act's constitutional infirmities or remedy the irreparable injury which would be suffered by the Rock Island estate were the Act to be implemented. Consequently, the court refused to vacate its earlier order. Judge McGarr ruled that the Act remained unconstitutional:

> This court has studied the Staggers Rail Act amendments to the Rock Island Act, has reviewed carefully the arguments of counsel, the documents filed by the various parties, the

[4]Section 106(d)(1) of the original Act, which precluded any Commission or judicial stay of an order imposing labor protection under the Act, and the last sentence of § 106(d)(2), which precluded review by this Court, were eliminated.

ruling of June 9, 1980, and the court's knowledge of these proceedings, and it remains clear that the Rock Island estate continues to be exposed to irreparable injury by the provisions of the Rock Island Act as amended by the Staggers Rail Act. The Staggers Rail Act does not cure the defects found in the Rock Island Act. Like its predecessor, the Staggers Rail Act imposes a $75,000,000 cost of administration claim on the Rock Island estate with priority over claims of general creditors and shareholders on the assets of the estate.

Petitioner argues that the statutory scheme can be implemented, the money disbursed, and the validity of the program and extent of the Rock Island liability to finance it, later litigated. This, in fact cannot be done without irreparable injury to the administration of the estate for the benefit of the creditors. The trustee is currently liquidating assets and preparing the plan for distribution to creditors. Under court order, the trustee is also preparing an interim plan for the immediate partial satisfaction of cost of administration claims. The imposition of a $75,000,000 uncertainty on the estate will totally halt the liquidation for the long period consumed by the appellate process, with irreparable injury to the already long-suffering creditors. Further, the whole liquidation plan will be distorted by the brooding omnipresence of a potential liability representing a significant percentage of the total assets.

Order of October 15, 1980, at 3-4 (RLEA Jurisdictional Statement App. B-1 at 5a).

Although the appeal from Judge McGarr's June 9 injunction remained pending in this Court, Section 701(a)(1) of the Staggers Act also added a new provision on judicial review to the original Act. Section 124 mandated that an appeal from any decision of the reorganization court respecting the constitutionality of the amended Rock Island Act must be taken to the Court of Appeals for the Seventh Circuit (notwithstanding the pendency of appeals of the June 9 injunction in this Court), that the appeals must be heard *en banc*, and that the court of appeals must render its final decision within 60 days of the filing of the last appeal. Con-

sequently, RLEA appealed from Judge McGarr's denial of its motion to vacate the June 9 injunction to the court of appeals.[5] But the forum thought by Congress and RLEA to be most favorable, the Seventh Circuit, did not sustain the constitutionality of this unprecedented legislation and affirmed Judge McGarr's decision.[6]

On December 31, 1980, the court of appeals also denied RLEA's motion for an "emergency" stay of the district court's order.[7] Nearly one month later, RLEA filed another "emergency" application with Justice Stevens to stay the district court's order. That motion was also denied, whereupon RLEA applied to Justice Rehnquist for a stay. This third application for a stay now pends before this Court.

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[5]In an effort to overcome this extraordinary Congressional circumvention of the usual appellate process prescribed by 28 U.S.C. § 1252, and in order to accelerate judicial review, appellees submitted to this Court a petition for certiorari before judgment by the court of appeals and a motion for expedited consideration thereof. *Gibbons v. RLEA*, No. 80-704 (U.S., *petition for cert. filed* Oct. 30, 1980). Despite RLEA's professed desire for a speedy final adjudication of the constitutionality of the Rock Island Act, RLEA did not support appellees' efforts for expedited review, presumably because RLEA did not wish to forego consideration of its appeal by the forum Congress had specially legislated on RLEA's behalf despite the pending appeal in this Court.

[6]*In re Chicago, R. I. & P. R. R.*, Nos. 80-2487 and 80-2536 (7th Cir. Dec. 16, 1980).

[7]*In re Chicago, R. I. & P. R. R.*, Nos. 80-2487 and 80-2536 (7th Cir. Dec. 31, 1980) (order denying motion for stay). In its application to Justice Rehnquist, RLEA represents that "on December 31, 1980, the court of appeals, *granted* RLEA's request to stay that preliminary injunction, contingent upon this Court's granting a stay of the original injunctive order of June 9, 1980." Application By Appellant Railway Labor Executives' Association for Stay of Preliminary Injunction Affirmed By an Equally Divided Court of Appeals, *RLEA v. Gibbons*, No. A-640 at 3 (U.S., *application filed* Jan. 28, 1981) (emphasis supplied). In truth, the court of appeals *denied* the stay application. Constrained by the *en banc* decision on the merits, affirming Judge McGarr's finding that the Rock Island Act as amended remained unconstitutional, and by this Court's denial on July 2, 1980 of RLEA's stay application, the court of appeals simply instructed the RLEA to look to this Court for the relief it seeks.

ARGUMENT

I.

THE DISTRICT COURT WAS MANIFESTLY CORRECT IN FINDING THE LABOR PROTECTION SCHEME OF THE ROCK ISLAND ACT UNCONSTITUTIONAL.

When Judge McGarr, who has presided over these proceedings since their inception, found that the Rock Island had fulfilled its public service obligations and that it thus had no further employee protection obligations, he had before him a destitute railroad that had served the public interest, in derogation of the interest of the creditors and shareholders, for five years.

The Rock Island filed for reorganization under Section 77 of the Bankruptcy Act of 1938, 11 U.S.C. § 205, on March 17, 1975, following a decade of devastating losses that totalled $103.4 million.[8] Judge McGarr, over the objections of the creditors and shareholders, caused his Trustee to continue rail operations during the ensuing four and one half years in an attempt to preserve rail service pursuant to the public interest objectives of Section 77. Massive operating losses resulted. In the period from January 1, 1975 through September 30, 1979, the Rock Island incurred losses in excess of $178.4 million.[9] By the summer of 1979, the Trustee's cash reserves had deteriorated to the point where the Trustee was unable to pay his operating expenses.[10] Thus, at a cost to the creditors and shareholders of over $175 million in operating losses, the jobs of Rock Island employees were preserved for a period of almost five years after the filing of the Section 77 petition.

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[8]See Response of Intervenors Crown, et al. to Trustee's Report for 1978 and Four Months 1979 at 30 (Sept. 6, 1979), reprinted in Supplemental Appendix to Appellees' Motion To Affirm, filed Dec. 17, 1980 (hereinafter, "Supp. App. ____") at H-7.

[9]*Id.*, Income Statement-1979 (Supp. App. G-15).

[10]*Id.*, ICC Directed Service Order No. 1398, Appendix A, 44 F.R. 56,343 at 56,352-54 (1979).

Notwithstanding the financial disaster that had befallen the Rock Island, the Brotherhood of Railway and Airline Clerks and the United Transportation Union, represented in these proceedings by RLEA, struck the Rock Island on August 28, 1979.[11] On September 20, 1979, President Carter appointed an emergency board pursuant to Section 10 of the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, thereby mandating a return to work by the Rock Island employees.[12] Contrary to Judge McGarr's expectations,[13] and in defiance of President Carter's order, the Rock Island employees refused to return to work.

On September 26, 1979, the Interstate Commerce Commission ordered the Kansas City Terminal Railway Co. to operate and provide directed service over the lines of the Rock Island, based upon "the specific finding that [the Rock Island's] cash position makes its continuing operation impossible" and that the Rock Island "suffers from the type of 'cashlessness' described in 49 U.S.C. § 11125 (a) (1)."[14] Since that date, the Rock Island estate has had no railroad operations.

On January 21, 1980, Peat, Marwick, Mitchell & Co., the court's own expert, filed its report with the reorganization court. The report concluded that the Rock Island was not reorganizable as an ongoing railroad even if pared to its most profitable core. Report of Peat, Marwick, Mitchell & Co. (Jan. 21, 1980).

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[11]The striking unions insisted upon payment of retroactive wage increases before agreeing upon even miminal work rules changes which the Trustee had sought in order to reduce costly waste and featherbedding. The retroactive wage increases in dispute would have cost the Rock Island estate $14 million—an amount of money the unions knew to be unavailable to the Trustee. The Trustee's position was that costly, inefficient work rules must be eliminated before he could pay wage increases. Report of Emergency Board No. 191 (Oct. 22, 1979) (Supp. App. C).

[12]*Id.*

[13]See Transcript of Proceedings, Sept. 21, 1979, at 9-11 (Supp. App. A-4-6).

[14]Directed Service Order No. 1398, *supra* note 3.

Based upon these circumstances, on January 25, 1980, Judge McGarr found that "a continuation of the Rock Island on an income producing basis, whether in core or in whole or in part . . . is just not possible. . . ." Transcript of Proceedings, Jan. 25, 1980, at 100. Judge McGarr thereupon ordered his Trustee to commence the liquidation of the Rock Island. *Id.* at 97.[15]

The court's finding that the Rock Island was not reorganizable as an ongoing railroad was subsequently confirmed by the Interstate Commerce Commission in a report to the reorganization court on May 27, 1980. The Commission concurred in the view that the Rock Island "has no realistic hope for reorganization or continued public service in its present form." *Chicago, Rock Island & Pacific Railroad Co.—Abandonment,* Interstate Commerce Commission Report, Docket No. AB-46 (Sub-No. 22) (May 27, 1980) at 4 (Supp. App. I-4).

On June 2, 1980, Judge McGarr confirmed the total abandonment of all Rock Island lines and discontinuance of service. Citing *Brooks-Scanlon Co. v. Railroad Commission,* 251 U.S. 396 (1920), and its progeny, Judge McGarr found that the Rock Island's abandonment of its entire railroad system was constitutionally mandated and that to force the Rock Island to continue operations indefinitely at a loss would constitute a violation of the fifth amendment rights of the creditors and shareholders. Consistent with the ICC's own precedent, the equities of the Rock Island situation, and because the Rock Island was constitutionally entitled to withdraw from rail operations, Judge McGarr also found that no labor protection obligations could be imposed in connection with the Rock Island's total line abandonment. Order No. 248 (June 2, 1980) (App. B, *infra*, at b-1).

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[15]Judge McGarr's liquidation order of January 25, 1980, was affirmed by the United States Court of Appeals for the Seventh Circuit on February 11, 1981. The court's opinion is reprinted in Appendix A, *infra. In re Chicago, R. I. & P. R. R.*, No. 80-1353 (7th Cir. Feb. 11, 1981).

In essence, the reorganization court decided that having sustained immense losses in the service of the public during five years of attempted reorganization under Section 77, the Rock Island could no longer be compelled to devote its own resources to further the public interest.[16] As is fully set forth in the Motion to Affirm at 10-16, the limited period during which Rock Island's creditors and shareholders can be assumed to have agreed to commit the estate's resources to the public's transportation needs has long passed, and can be extended no further, consistent with the fifth amendment. Because the Rock Island estate can no longer be required to continue to devote its resources to advance national transportation policy, *a fortiori,* it cannot be required to further a component of that policy through new employee protection obligations.

RLEA repeatedly alludes to the unfortunate plight of the former employees of the Rock Island who have lost their means of livelihood as a result of the railroad's liquidation. *See, e.g.,* RLEA Jurisdictional Statement at 8. RLEA ignores the fact that the creditors and shareholders of the Rock Island have already sustained immense losses while the jobs of the Rock Island's employees were preserved for five years following the filing of the reorganization petition. RLEA also fails to mention the role that its own members played in the demise of the Rock Island, when its two largest unions struck the Rock Island at its most desperate hour. Finally, RLEA ignores the fact that, to the extent the Rock Island Act's labor protection program is necessary to further national transportation policies, the fifth amendment, *Brooks-*

[16]The Seventh Circuit Court of Appeals, in rejecting the argument of the RLEA that the Rock Island should not be permitted to liquidate, observed:

> "... the history of this case indicates that the reorganization court has duly considered the public interest throughout the reorganization proceedings and has determined that continued operation of the Rock Island no longer serves the public interest."

In re Chicago, R. I. & P. R. R., No. 80-1353, slip op. at 12 (App. A, *infra,* at a-15).

Scanlon and its progeny require that the government, and not the bankrupt Rock Island estate, pay the cost of the public benefit.[17]

In addition, the Rock Island Act plainly violates the constitutional principles of due process, separation of powers, and equal protection. As is more fully set forth in the Motion to Affirm, at 17-21, the Rock Island Act is replete with constitutional defects. First, the Rock Island Act violates the separation of powers doctrine by directing the reorganization court to impose without judicial review any labor protection arrangement ordered by the Commission. Second, the Rock Island Act violates the due process and separation of powers principles by its extraordinary curtailment of appellate review, including its attempt to mandate *en banc* review by the Seventh Circuit within a 60 day period. Third, the Act unconstitutionally singles out the Rock Island, thus offending the due process and equal protection clauses of the fifth amendment and resulting in special punitive legislation which the constitutional prohibition against bills of attainder was designed to prevent. Finally, the Rock Island Act violates the constitutional requirement that bankruptcy laws be uniform.

For all of these reasons, the reorganization court was manifestly correct in its finding that the Rock Island Act, even as amended by the Staggers Act, is unconstitutional.

II.

THE OBLIQUE REFERENCE TO THE TUCKER ACT DOES NOT RENDER CONSTITUTIONAL THE OTHERWISE UNCONSTITUTIONAL ROCK ISLAND ACT.

RLEA's motion to vacate Judge McGarr's June 9 injunction and its appeal of his refusal to do so are premised on the Staggers

[17]As this Court stated in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 49 U.S.L.W. 4033, 4035 (U.S. 1980), quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960):

> "[t]he Fifth Amendment's guarantee ... was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

Act's addition of Section 124(c) to the Rock Island Act. That Section provides that:

> Nothing in this Act . . . shall limit the right of any person to commence an action in the United States Court of Claims under section 1491 of title 28, United States Code (commonly referred to as the "Tucker Act").

As is set forth in detail in the Motion to Affirm, at 21-27, the addition of this oblique reference to the Tucker Act does not cure the many constitutional defects that otherwise exist in the Rock Island Act.

The reference to the Tucker Act in Section 124(a) does not provide any certainty that the government will fund the labor protection scheme. Indeed, the bare mention of the Tucker Act without more is as vague as the suggestions concerning the availability of a Tucker Act remedy that were advanced in support of the original Act, suggestions which Justice Stevens found to be "equivocal" at best. *RLEA v. Gibbons, supra,* 100 S.Ct. at 2671. To pass constitutional muster, this Court has heretofore required "reasonable, certain and adequate" provisions for compensation at the time of the taking. *Regional Rail Reorganization Act Cases* (*"3R Act Cases"*), 419 U.S. 102, 156 (1974). Although many unequivocal alternatives were available to Congress to meet this requirement, the loose and noncommittal language of Section 124(a) simply does not rise to that level.

Both cases relied upon by RLEA in its Jurisdictional Statement at 22-24 to circumvent this conclusion are inapposite. *Hurley v. Kincaid,* 285 U.S. 95 (1932), involved specific real property which the government required to build a vitally needed floodway. Unquestionably, the government would have to compensate the owner for any flooding of his property. The only question deferred for later determination was the amount of compensation.

Similarly, in the *3R Act Cases*, the government had an emergent need for the rail lines of the Penn Central because those lines were essential to the economy of the Northeast. The Government conceded at the outset that a taking had occurred and that some compensation must be paid. Congress therefore appropriated $1.5 billion in cash and securities as compensation prior to the transfer, which amount could be adjusted in the subsequent Tucker Act proceeding. *3R Act Cases*, 419 U.S. at 128. Thus, the existence of a taking and the requirement of some governmental compensation of the Penn Central estate was not at issue in the *3R Act Cases*.

By contrast, here the government has not conceded that any taking has occurred or that the Rock Island estate has a right to any compensation. Moreover, here the government has no emergent need for specific property of the Rock Island. Unlike unique rail properties that are essential to a regional economy or land that must be used for a floodway, here $75,000,000 in cash, a completely fungible commodity, is to be taken by the government. It would be absurd to contend that the government has a pressing need for the cash of a bankrupt railroad in liquidation. The government may not use the Tucker Act to justify the seizure of $75,000,000 in totally fungible cash on the promise of "pay now—litigate later," any more than the government could justify the attachment of an individual citizen's bank account with the mere statement that he is not precluded from the opportunity to file a Tucker Act proceeding in the court of claims at a later date. Accordingly, the cases relied upon by RLEA to suggest that a possible later Tucker Act "remedy" cures an unconstitutional taking do not support that conclusion.

RLEA attempts to minimize Judge McGarr's finding that the "brooding omnipresence of a potential liability representing a significant percentage" of the Rock Island's total assets would seriously disrupt the liquidation of the estate. Order of October

15, 1980, at 3-4 (RLEA Jurisdictional Statement App. B-1 at 5a). RLEA argues that the potential liability will remain uncertain in any event until a final resolution of this appeal. See Jurisdictional Statement at 23-24.

However, the reorganization court's findings are rooted in and clearly supported by the troubled history of the Rock Island, with which Judge McGarr is intimately familiar. Within the last six years, the Rock Island has twice failed to meet its obligations to its trade creditors.[18] In light of these two prior defaults in payments to trade creditors, and in light of existing expenses of administration that may exceed $195,000,000,[19] the imposition of a $75,000,000 expense of administration on this estate creates a serious risk that trade creditors henceforth will be unwilling to deal with the Trustee on any basis other than cash in advance.

If the cost of administration claimants were to insist upon the impoundment of all or most of the proceeds arising from the sale of Rock Island assets, as some have already requested,[20] the Trustee's ability to obtain funds with which to pay the expenses of liquidation could be fatally impaired. Absent these funds, the orderly liquidation now under way could quickly become a shambles, at great loss to the creditors and shareholders of the Rock Island estate.[21]

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[18]For a complete recitation of these prior defaults, see Memorandum of the Trustee, Creditors and Shareholders In Opposition To the Appellant RLEA's Application For a Stay of the Preliminary Injunction Issued By the District Court and Affirmed By the Court of Appeals for the Seventh Circuit, *RLEA v. Gibbons,* No. 80-1239 at 15-17 (U.S., *memorandum filed* Jan. 27, 1981) (hereinafter, "Appellees' Memorandum in Opposition to Stay").

[19]See Proposed Plan of Reorganization for Chicago, Rock Island & Pacific Railroad Company, filed on Dec. 28, 1979 at 19.

[20]For more detailed information, see Appellees' Memorandum in Opposition to Stay at 16-19.

[21]See Objection of United States Leasing International, Inc., to Trustee's Petition for Order Authorizing and Approving Sale and Other

(*Footnote continued on following page*)

RLEA argues that the cash position of the Trustee will not be harmed and, consequently, the orderly liquidation will not be impaired because "Congress has provided a funding mechanism to supply the monies needed to implement Section 106" so that the Trustee "need not expend one penny of estate funds until after this appeal is resolved and he repays the Government." Jurisdictional Statement at 24. RLEA assumes that the Trustee will be able to borrow the necessary $75,000,000 from the government, pursuant to Section 110 of the Rock Island Act. There is, however, absolutely no assurance that the Trustee will be able to obtain a government loan.

Section 110 provides that labor protection payments be funded from a government loan *or* from the assets of the Rock Island estate. The government is not obliged to lend the Rock Island money. A new President and a new Congress now have taken office, who are not subject to election year exigencies and face an economic and budgetary crisis that mandates paring federal expenditures in every possible way. RLEA has no basis for assuming that the new administration will be disposed to loan $75,000,000 to the Rock Island. Indeed, the new administration is likely to look with disfavor on the fiscal sleight of hand proposed by RLEA—that the money be paid out now subject to a later court of claims determination as to whether the government must assume the cost. RLEA undoubtedly favors this back-door method of financing (through use of the Tucker Act) because it knows that the new Congress and the new President are unlikely to make a straightforward Treasury appropriation of $75,000,000 for this purpose.

Regardless of whether the labor protection scheme is funded from the assets of the Rock Island or by a government loan

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(*Footnote continued from previous page*)
Transactions Relating to Locomotives, Inventory, and Silvis, Illinois, Properties at 8, Dec. 18, 1980 (Supplemental Appendix of Trustee, Creditors and Shareholders, filed Jan. 27, 1981, at E-8).

occupying expense of administration status, the result will be to disrupt a speedy and orderly liquidation. Significantly, RLEA conceded in its Stay Application to Justice Stevens that "until the validity of Section 106 is resolved, there cannot be any meaningful plan to distribute the estate's assets." Application by Appellant Railway Labor Executives' Association for Stay of Preliminary Injunction, *Railway Labor Executives' Ass'n v. Gibbons*, No. A-640 (*application filed* Jan. 22, 1981) at 10. To relegate the estate to a later proceeding in the court of claims, with no assurance of ultimate payment, would be to subject the estate and its creditors to a severe disruption in the liquidation proceedings, delaying for years the formulation and implementation of a meaningful plan of reorganization. Judge McGarr was, therefore, manifestly correct in finding that the question of the Rock Island Act's constitutionality is ripe for determination now and should not be deferred to a subsequent court of claims proceeding. The Trustee, creditors and shareholders respectfully submit that the only way to prevent further disruption to the estate and the harm to its creditors and shareholders is now to affirm Judge McGarr's finding that the Rock Island Act is unconstitutional.

CONCLUSION

For the foregoing reasons and for the reasons stated in the Motion to Affirm, appellees respectfully request that this Court note probable jurisdiction of this appeal, consolidate it with Case No. 80-415, and affirm the reorganization court's orders of June 9, 1980 and October 15, 1980.

Respectfully submitted,

Of Counsel:

By_____
Nicholas G. Manos
Attorney for William M. Gibbons, Trustee of the Chicago, Rock Island & Pacific Railroad Company

NICHOLAS G. MANOS
332 South Michigan Avenue
Chicago, Illinois 60604
(312) 435-7494

By_____
Albert E. Jenner, Jr.
Daniel R. Murray
Barbara S. Steiner
Deborah H. Bornstein
Randall E. Mehrberg
Attorneys for Henry Crown et al.

JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

By_____
Terry F. Moritz
Michael C. Kim
Attorneys for The First National Bank of Chicago, as Indenture Trustee

RUDNICK & WOLFE
30 North LaSalle Street
Chicago, Illinois 60602
(312) 368-4000

By_____
Milton L. Fisher
Harold L. Kaplan
Attorneys for Continental Illinois National Bank and Trust Company of Chicago, as Indenture Trustee

MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604

February 18, 1981

APPENDIX A

DECISION OF COURT OF APPEALS AFFIRMING THE DISTRICT COURT'S ORDER OF LIQUIDATION

FEBRUARY 11, 1981

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

February 11, 1981

Before

Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. WESLEY E. BROWN, *Senior District Judge**

IN THE MATTER OF:

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY
Debtor.

No. 80-1353

APPEAL OF:

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Intervenor.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 75 B 2697
Frank J. McGarr, *Judge.*

*Honorable Wesley E. Brown, Senior District Judge for the District of Kansas, is sitting by designation.

ORDER

This case presents one aspect of the continuing saga of the decline of the Chicago, Rock Island and Pacific Railroad Company ("Rock Island"). There are two questions before us in this appeal:

> (1) Did the district court, sitting as a railroad reorganization court under Section 77 of the Bankruptcy Act, 11 U.S.C. §205, have the discretion to determine that the Trustee's plan of reorganization was unworkable and to refuse to transmit that plan to the Interstate Commerce Commission ("ICC")?
>
> (2) Did the district court, sitting as a railroad reorganization court, have the authority to order the Trustee to commence liquidation of the railroad?

The Railway Labor Executives' Association ("RLEA") argues that we should reverse the district court's order directing the Trustee to liquidate the Rock Island estate and that we should order the district court to transmit to the ICC the plan of reorganization filed by the Trustee on December 28, 1979. The Trustee of the Rock Island, William M. Gibbons, and various creditors of the Rock Island ("Creditors")[1] ask us to dismiss this appeal as moot or to affirm the actions of the district court.

I

On March 17, 1975, the Rock Island filed a petition for reorganization in the United States District Court for the Northern District of Illinois under Section 77 of the Bankruptcy Act, 11

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[1]The parties referred to collectively as "Creditors" are as follows: First National Bank of Chicago and Continental Illinois National Bank and Trust Company of Chicago, in their capacities as indenture trustees, and Henry Crown, et al., holders of first mortgage bonds, income debentures and common stock of the Rock Island.

The Trustee joined in the Creditors' Brief solely on the ground that the liquidation is not reversible and is so far advanced that any delay would be physically and economically impossible.

U.S.C. §205.[2] Judge McGarr was assigned to act as the reorganization court. On March 28, 1975, William M. Gibbons was appointed Trustee of the Rock Island and was instructed to manage and operate the debtor's railroad system.

Section 77(d) provides that "[t]he debtor, after a petition is filed . . ., shall file a plan of reorganization within six months of the entry of the order by the judge approving the petition as properly filed. . . ." 11 U.S.C. §205(d). The reorganization court several times extended the deadline for the Trustee to file a plan of reorganization. The Trustee filed his Plan of Reorganization ("Plan") on December 28, 1979.[3] An informational copy was furnished to the ICC in accordance with Bankruptcy Rule 8-301(c).

On January 8, 1980, the court entered Order No. 221. In that order the court found: it had jurisdiction pursuant to Bankruptcy

[2]The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978), enacted November 6, 1978, codified and changed the prior Bankruptcy Act, including former Section 77. Section 403(a) of the Bankruptcy Reform Act, 92 Stat. 2683, however, provides that pending reorganizations, such as the one at bar, were to be governed by the previous law except for a few exceptions set forth in Section 403(b).

[3]Throughout the five years of reorganization prior to the filing of the Plan, the Rock Island suffered significant financial losses. The ICC found the Rock Island to be cashless on September 26, 1979, and ordered the Kansas City Terminal Railway Company ("KCT") to provide directed service over the Rock Island routes. *Directed Service Order No. 1398, Kansas City Terminal Ry.—Directed to Operate Over—Chicago, R. I. & P.*, 360 I.C.C. 289 (1979). This directed service was in effect at the time of the order appealed in the case at bar.

KCT's directed service ended on March 23, 1980. Following KCT's directed service operations, other rail carriers provided rail service over the Rock Island's lines through May 31, 1980, pursuant to ICC directed service orders. On May 30, 1980, the President signed the Rock Island Railroad Transition and Employee Assistance Act (the "Rock Island Act"), P.L. 96-254, 94 Stat. 339 (1980). The Rock Island Act provides for the continuation of directed service pending sales of the Rock Island's freight lines to other interested rail carriers and its Chicago-Joliet commuter line to the Regional Transportation Authority.

Rule 8-303[4] to retain the Plan for not less than thirty days; during that time the court would review the plan in the context of a study by Peat, Marwick & Mitchell, a court appointed independent consultant, and would consider modifications, alternative plans, and comments; the informational copy of the plan filed with the ICC did not constitute an official filing with the ICC; and the court would "formally transmit the Plan of Reorganization, modifications to it, and alternative plans, in accordance with Bankruptcy Rule 8-303, with whatever comments it may have, to the Commission for their action, pursuant to Bankruptcy Rule 8-303, with instructions to the Commission that the Commission should consider the Plan at that time."

On January 21, 1980, Peat, Marwick, Mitchell & Co. filed its report, in which it concluded that the core operation proposed by the Trustee in the Plan was not viable. At a status hearing on January 25, 1980, the Creditors and the Federal Railroad Administration argued that since the independent consultant had concluded that the Trustee's Plan was not feasible, the court should direct the Trustee to withdraw the Plan and to file a new plan which would provide for the total liquidation of the estate. The Creditors argued that the court would simply be wasting everyone's time in transmitting the Plan, or any reorganization plan, to the ICC. At that time, the Trustee argued that the Plan should be forwarded to the ICC for evaluation of the reorganizability of the core.

After listening to the arguments of counsel who were present at that status conference,[5] the court concluded that the consultant's

[4]Bankruptcy Rule 8-303 provides:

> Not less than 30 days after the first filing of a plan under Rule 8-301, the court shall transmit all plans and modifications which have been filed with it to the Interstate Commerce Commission for filing with and consideration by the Commission.

[5]The ICC did not appear at the hearing of January 25, 1980, although the ICC had been active in the proceedings to that date. At the January 25 hearing, John Broadley of the United States Department of Justice, representing the Federal Railroad Administration, stated:

(Footnote continued on following page)

report "is a good study and I am compelled to accept its conclusions." Tr. 97. The court continued:

> This being so I am compelled also, if logic prevails, to accept the conclusion that the plan of reorganization proposed by the Trustee has no hope of success.
>
> The Trustee is therefore instructed not to forward the plan of reorganization to the Commission. The Trustee is instructed to continue his present plans for cessation of operations by the time of the anticipated termination of the directed service order with the hope that that might be extended, and the Trustee is instructed to prepare and file with the Court a preliminary plan of liquidation. . . .

Tr. at 97. The court's minute order of January 25, 1980 granted the Creditors' motion that the court decline to forward the Plan to the ICC and directed the Trustee to begin preparation of a plan of liquidation.

On February 19, 1980, the RLEA filed comments on the court's January 25 order. The court ordered that it would treat the comments as a motion for reconsideration. On February 27, 1980, the court denied the RLEA's motion to reconsider. The RLEA appeals from both the order of January 25, 1980 and the denial of reconsideration.

(Footnote continued from previous page)

> In connection with preparing a proposed order I had a discussion with Mr. Rush yesterday about the position the Commission would likely take if your Honor entered an order directing the Trustee to withdraw this plan. Mr. Rush indicated that if your Honor entered such an order the Commission, in all likelihood, would not find it expedient, necessary or proper to appeal that decision on jurisdictional grounds. And the Commission has frequently expressed concern about the exercise of its primary jurisdiction. Mr. Rush's indication to me was that if your Honor finds that the plan has no merit and decides that you should order the Trustee to withdraw it, that the Commission would acquiesce in that decision.

Tr. at 56-57. Mr. Broadley joined the creditors in seeking to have the plan of reorganization withdrawn.

Before proceeding to the legal arguments, we briefly recount the history of the Rock Island since February, 1980. On March 19, 1980, the court entered Order No. 229, which required the Trustee to file a plan of reorganization by July 17, 1980, encompassing the liquidation of the assets of the debtor. On April 14, 1980, the court entered Order No. 232, which directed the Trustee to file an application with the ICC "for its report confirming the abandonment of the Rock Island's total railroad system subject to sale of portions of such system to other entities for their operation thereof."[6]

The ICC filed its report in response to the Trustee's application for system-wide abandonment on May 23, 1980. Docket No. AB-46 (Sub.-No. 22). The ICC concluded that "abandonment of the Rock Island and its dissolution as an operating railroad is required by the public convenience and necessity." Docket No. AB-46 (Sub.-No. 22) at 3. The ICC denied the RLEA's motion to reject the abandonment application. *Id.* at 5-6.

On June 2, 1980, the reorganization court held hearings concerning the proposed abandonment and ordered total system-wide abandonment of the Rock Island's lines and discontinuance of its service.

The Trustee already has taken various steps toward liquidating the Rock Island. On June 16, 1980, the RLEA moved for a stay of liquidation, detailing the progress of the liquidation as follows:

> Rolling stock leases have been assigned or terminated while other operating equipment has been sold. On May 5, 1980, the District Court entered Order No. 234 granting the Trustee blanket authority to liquidate real and personal assets

[6]Section 17(a) of the Milwaukee Road Restructuring Act ("MRRA"), Pub. L. No. 96-101, 93 Stat. 736 (1979), transferred ultimate jurisdiction over abandonments from the ICC to the reorganization court for cases pending under Section 77 of the Bankruptcy Act. Section 17(a) of the MRRA provides that the court may authorize abandonments pursuant to 11 U.S.C. §1170.

> and accounts under $100,000.00 in value. Real property, such as track rights of ways, has been sold. *See,* Docket Sheet Page 194-95. Also, an independent consultant has been retained by the estate to expeditiously liquidate the real property of the estate. Order dated May 28, 1980.

RLEA Motion to Stay at 5. On November 21, 1980, this court ordered that the RLEA's motion to stay further acts of liquidation pending appeal would be taken with the case at the time of its disposition.

On December 20, 1980 the RLEA filed with this court its "Emergency Renewal of Motion by Railway Labor Executives' Association to Stay All Further Acts of Liquidation Pending Appeal." The "Renewed Motion" was prompted by the Trustee's announcement of his intention to sell the Silvis, Illinois, facility and 214 locomotives to the Varlen Corporation. The RLEA argued that:

> [t]his single sale will surely decrease the already slim chances for reorganizing the Rock Island, for any resumption of rail operations over the core structure would encounter severe difficulties in resuming operations without sufficient engines and a major repair facility.

RLEA Renewed Motion at 4.

On December 24, 1980 we entered the following order:

> IT IS ORDERED that the renewed motion is DENIED to the extent that it seeks a stay of the sale of the properties mentioned in the intervenor-appellant's renewed motion. Intervenor-appellant has failed to satisfy all of the requirements for a grant of stay pending appeal. We cannot conclude at this point in our deliberations that the intervenor-appellant shall prevail on the merits of this appeal.
>
> The intervenor-appellant's motion of June 16, 1980, seeking a general stay pending appeal in this case, shall be resolved at a later date by the merits panel.

We now reach the merits and conclude that the district court acted within its authority in refusing to transmit the Trustee's plan of reorganization to the ICC and in ordering the Trustee to commence liquidation of the Rock Island.

II

Section 77(d) of the Bankruptcy Act, 11 U.S.C. § 205(d), deals with the filing of a plan of reorganization in a railroad reorganization. The RLEA argues that the ICC is to play the major role in reorganizing a debtor under Section 77, and that Bankruptcy Rule 8-303 cannot enlarge the jurisdiction of the court to examine the merits of a plan prior to transmittal to the ICC pursuant to Rule 8-303.

First, the RLEA argues that the ICC has the primary responsibility for formulating a reorganization plan and that, therefore, the reorganization court should not have rejected the Plan before the ICC had a chance to consider it. The RLEA finds support for its argument in *Ecker v. Western Pac. RR. Corp.*, 318 U.S. 448 (1943), where the Supreme Court stated:

> When examined to learn the purpose of its enactment, § 77 manifests the intention of Congress to place reorganization under the leadership of the Commission, subject to a decree of participation by the court.

318 U.S. at 468. But, while recognizing the importance of the expertise of the ICC, the Supreme Court also recognized the power of the reorganization court to find that a debtor is unreorganizable. The Supreme Court acknowledged that the reorganization court can veto a reorganization plan in its entirety after certification of the plan by the ICC. 318 U.S. at 474. *See* Section 77(e), 11 U.S.C. § 205(e).

The RLEA's reliance on *Ecker* to establish that the reorganization court should defer to ICC findings is misplaced. In *Ecker*, the Court affirmed the district court's approval, pursuant to Section

77(e), of a plan of reorganization certified by the ICC. The Court reversed the Ninth Circuit's finding that the district court should have exercised its independent judgment with respect to subjects such as valuation. A reorganization court's acceptance of ICC findings in proceedings pursuant to Section 77(e) simply is not relevant to the question of whether the reorganization court can order the Trustee to withdraw a proposed plan *before* submission to the ICC. *Ecker* dealt with the reorganization court's scope of review of a plan *after* certification by the ICC, not with a proposed plan submitted to the court by the Trustee.

Furthermore, in the more recent *New Haven Inclusion Cases*, 399 U.S. 392, 431-34 (1970), the Supreme Court emphasized the important, indeed dominant, role of the reorganization court in Section 77 proceedings. In that case, as in *Ecker*, the issue was the reorganization court's scope of review of ICC findings pursuant to Section 77(e). The Court stated:

> The statutory authority to appoint special masters and hold evidentiary hearings reflects the unique powers possessed by the reorganization court in passing upon the Commission's proposed plan of reorganization.
>
> . . .
>
> In the reorganization court reposes ultimate responsibility for determining that the plan presented to it by the Commission satisfies the "fair and equitable" requirement of § 77.

399 U.S. at 434. Without deciding to what degree *New Haven Inclusion Cases* erodes *Ecker*'s deference to ICC expertise in Section 77(e) proceedings,[7] we find that the balance of power between the reorganization court and the ICC in Section 77(d) proceedings does not require the reorganization court to seek ICC consideration of a proposed reorganization plan when the court has found that the plan has no chance of success.

[7] In his dissent, Justice Black complained of the majority's departure from *Ecker*. 399 U.S. at 499.

Next, the RLEA argues that the structure of Section 77(d) and Rule 8-303 show that the court's role with respect to the Trustee's plan is purely ministerial. The RLEA claims that the purpose of allowing the court to retain a plan for *not less than* 30 days is only for the sake of achieving efficiency by assuring that "all proponents of plans have filed their plans prior to transmission of the first filed plan to the Commission." Rule 8-303, Advisory Committee Note. We disagree. The ordinary outcome under Rule 8-303 will be that the court will transmit a plan to the ICC. But we cannot say that the court has no discretion whatsoever to aid in the efficient management contemplated by Rule 8-303 by refusing to transmit a manifestly unfeasible plan to the ICC.

Shortly after the Trustee's Plan was submitted, but before it was evaluated in light of the Peat, Marwick study, the reorganization court reflected on the purposes of Rule 8-303:

> Those purposes are obviously a preliminary review by the Court, of the proposal of alternative plans, and in the particular instances of this case an opportunity for the Court and the creditors and the Railroad, and the Government, to view this plan in the context of the Peat, Marwick evaluation of it. And under any ordinary circumstance that would not only be the ordinary course of the case but the wise course of the case. I think the thirty days is therefore a purpose. I recognize that the Court had very little discretion in this matter in terms of what it might do with the plan. It is conceivable to me, although I doubt that it will be applicable in this case, that the plan presented be one either by reading on its face or in the light of the Peat, Marwick evaluation, be one so completely without merit that the Court will not forward it to the Commission and order the preparation of another one, something more sensible.

Tr. of January 2, 1980 at 31-32. The court recognized that its discretion not to submit the plan to the ICC was limited to a situation that the court doubted would occur—that the plan was without merit in light of the Peat, Marwick study. But that situation

did occur, and the court properly exercised its discretion not to transmit the plan.

The court's action did not circumvent ICC involvement in either the reorganization or liquidation process. The court did not simply withhold the Plan from the ICC and commence reorganization without ICC input. Rather, the court ordered the Trustee to prepare a new plan aimed at liquidation. In fact, the court stated that the January 25, 1980 decision not to transmit the plan to the ICC "starts now rather than later the process of private sale and Commerce Commission reorganization of railroad service . . . ." Tr. of January 25, 1980 at 98.

The ICC has not challenged the reorganization court's actions. At the hearing before the January 25 ruling, the government representative present informed the court that "[ICC counsel's] indication to me was that if your Honor finds that the plan has no merit and decides that you should order the Trustee to withdraw it, that the Commission would acquiesce in that decision." Tr. of January 25, 1980 at 56-57. In addition, the ICC's May 23, 1980 report recommending abandonment supports the court's view. The ICC states that

> [w]e have reviewed the carrier's present financial position and future prospects and conclude that it has no realistic hope for reorganization or continued service in its present form. The extremely deteriorated condition of its plant and severe erosion of its traffic base (through interrupted and uncertain operations) make it clear that the Rock Island will not be able to recover. Consequently, fairness to its creditors and stockholders dictates that the carrier be liquidated.

Docket No. AB-46 (Sub.-No. 22) at 3-4.

In light of the ICC's deference to the reorganization court's view of the Trustee's plan, as well as that court's great familiarity with the Rock Island through five years of reorganization proceedings, it is inaccurate for the RLEA to argue that the court

simply "substituted its judgment for that of the Commission." Reply Br. at 7. The court's decision must be viewed in the context of the entire history of the Rock Island. Judge McGarr stated in his January 25, 1980, ruling:

> I have listened to the Trustee for years through his counsel argue that I authorize and continue to be patient with the attempts to bring about a cash-based reorganization, based upon my finding of reorganizability. Mr. Manos argues in an abundance of emotion today that I should not decide that issue in four hours. I have in fact thought of very little else for four years. It has been the basic issue that I have confronted and the issue which I have had to decide over and over again as circumstances changed.

Tr. of January 25, 1980 at 95. Therefore, we hold that Judge McGarr's decision not to transmit the Trustee's plan to the ICC violated neither Section 77(d) of the Bankruptcy Act nor Bankruptcy Rule 8-303.

III

The RLEA argues that, in addition to not having jurisdiction to decide that the Trustee's plan was without merit, the reorganization court did not have the jurisdiction to order the Trustee to liquidate the Rock Island. The RLEA claims that Section 1174 of the Bankruptcy Reform Act of 1978, 11 U.S.C. § 1174, for the first time permitted railroad reorganization courts to direct and control liquidations, and that Section 77 of the Bankruptcy Act, which applies to this case,[8] contains no authority for liquidation. Thus, the RLEA argues that the court may dismiss the petition for undue delay in reorganization, pursuant to Section 77(g) and Bankruptcy Rule 8-310, but it may not unilaterally determine that the debtor is unreorganizable and order liquidation.

[8]According to § 403 of the Bankruptcy Reform Act, some provisions of the new Bankruptcy Code are applicable to Section 77 cases pending before its enactment. But, Section 1174 is not one of those sections which applies to cases commenced under the Bankruptcy Act. Pub. L. No. 95-598, 92 Stat. 2683 (1978).

According to the RLEA's interpretation of Section 77, the reorganization court must either dismiss the petition for reorganization or continue reorganization. The RLEA does not acknowledge the possibility that liquidation may be the end result of a Section 77 reorganization. But the RLEA's view ignores the fact that it is difficult to mark the point at which an attempt to reorganize becomes a liquidation. It would be absurd to hold that the reorganization court may supervise liquidation of all but a small core railroad, yet cannot supervise the liquidation of much of the same property once the concept of a viable core has been rejected.

Section 77 does not set any limit on what portion, if any, of the debtor must be preserved pursuant to Section 77 proceedings. Section 77(b), 11 U.S.C. § 205(b) states:

> (b) A plan of reorganization within the meaning of this section . . . (5) shall provide adequate means for the execution of the plan, which may include . . . the *sale of all* or any part of the property of the debtor. . . .

(emphasis added). In *New Haven Inclusion Cases*, the Supreme Court discussed the reorganization court's power to sell the assets of the New York, New Haven & Hartford Railroad ("New Haven") pursuant to § 77(b)(5). After noting that the reorganization court and trustees were "charged with the dual responsibility of conserving the debtor's estate for the benefit of creditors and preserving an ongoing railroad in the public interest," 399 U.S. at 420, the Court stated:

> The provisions of § 77 "doubtless suffice[d] to confer upon the [reorganization court] power appropriate for adjusting property rights in the railroad debtor's estate and, as to such rights, beyond that in ordinary bankruptcy proceedings." *Id.*, at 85-86; cf. 5 Collier, *supra*, ¶ 77.11, at 498-499. Together, the court and the Commission "unquestionably" had "full and complete power not only over the debtor and its property, but also, as a corollary, over any rights that [might] be asserted against it." *Callaway v. Benton*, 336 U.S. 132, 147. One such power was precisely that which the

> Commission was about to propose that the reorganization court exercise—the power to confirm a plan of reorganization providing for "the sale of all . . . of the property of the debtor. . . ." Bankruptcy Act, § 77(b)(5), 11 U.S.C. § 205(b)(5).

399 U.S. at 421 (footnote omitted). *See also Matter of Lehigh Valley R.R. Co.*, 558 F.2d 137, 141-47 (3rd Cir. 1977) and cases cited therein.[9] These cases indicate that each railroad in reorganization under Section 77 must be handled according to the unique circumstances of that debtor, and liquidation may be an appropriate option.

The RLEA does not seriously urge dismissal of this action and resort to equity receiverships for liquidation,[10] but it does argue that an equity receivership is the only way that the creditors of the

[9]In *Lehigh Valley*, the Third Circuit stated that "these cases provide persuasive support for the proposition that the reorganization of a railroad may properly continue under Section 77 despite the fact that the enterprise is no longer capable of being reorganized into a working railroad." 558 F.2d at 146. The court concluded that the reorganization court had jurisdiction "to reorganize or liquidate the enterprise pursuant to § 77, or pursuant to any other provisions of the Bankruptcy Act, if the court finds that such action would be in the best interests of the debtor's estate." 558 F.2d at 146-47.

The RLEA argues that the Lehigh Valley reorganization court's authority to liquidate under Section 77 comes from § 618(b) of the Railroad Revitalization and Regulatory Reform Act of 1976, which added § 601(b)(4), 45 U.S.C. § 791, to the Regional Rail Reorganization Act of 1973 ("Rail Act"), Pub. L. 93-236, 45 U.S.C. §§ 743, 744. But *Lehigh* and the cases discussed therein actually stand for the opposite result: the amendment authorized the continuation of Section 77 proceedings *despite* the special provisions in the Rail Act which transferred working railroad property to Conrail. 558 F.2d at 141-42.

[10]One of the reasons for enactment of Section 77 was to avoid equity receiverships for railroads. As stated in *New Haven Inclusion Cases*:

> Congress enacted [Section 77] in part "to prevent the notorious evils and abuses of consent receiverships," *New England Coal & Coke Co. v. Rutland R. Co.*, 143 F.2d at 184, of which one of the more egregious was the requirement of an ancillary filing and order of appointment in the federal court for every district in which the debtor had property.

399 U.S. at 426-27.

Rock Island may withdraw their assets from public use at this time. The RLEA claims that since the creditors have enjoyed the benefits of having a single resolution of all claims, rather than many receiverships, they should bear the burden of serving the public interest by keeping their property invested in rail service. But the history of this case indicates that the reorganization court has duly considered the public interest throughout the reorganization proceedings and has determined that continued operation of the Rock Island no longer serves the public interest. Thus, the liquidation order does not violate the public interest considerations required by Section 77.

In summary, the reorganization court had the jurisdiction under Section 77 to decline to accept the Trustee's Plan and to order the Trustee to formulate a plan of liquidation. Furthermore, the reorganization court properly exercised its discretion in exercising that jurisdiction. Because of our holding on the merits, it is unnecessary to reach the Creditors' argument that this case is moot.

The order appealed from is

AFFIRMED.

APPENDIX B

EXCERPTS FROM ORDER NO. 248
JUNE 2, 1980

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

In the Matter of

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Debtor.*	In Proceedings for the Reorganization of a Railroad No. 75 B 2697

Order No. 248

This cause coming on as the hearing heretofore set by this Court by its Order No. 232 entered April 14, 1980, upon the Motion filed by William M. Gibbons, the Trustee herein and by the Indenture Trustees and the Henry Crown et al. intervenor interests and upon the direction of this Court to the said Trustee herein to file an application with the Interstate Commerce Commission for its report confirming the abandonment of the Debtor's ("Rock Island") total railroad system, the said application to be filed as described in Section 17 of the Milwaukee Railroad Restructuring Act (MRRA) and Section 1170 of the Bankruptcy Code, and

It appearing to the Court that the Interstate Commerce Commission has filed its report dated May 23, 1980 containing its advisory recommendations as prescribed under Section 17 of the MRRA as aforesaid and recommending total system discontinuance of service and abandonment, subject only to service continuity by other carriers at certain defined points and segments

pending possible transfer or sale to such carrier or other entities who may desire to continue such rail service, and

* * *

The Court having found that Rock Island's unconditional discontinuance of service and its total system abandonment is constitutionally mandated and having further found that to force a railroad to continue operations indefinitely at a loss in order that the public may be served is a violation of the Fifth Amendment rights of those who have a security interest in the enterprise. *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U.S. 396 (1920); and

The Court having further found that labor protective conditions or arrangements are not required of Rock Island's estate pursuant to Section 17 of the MRRA by reason of Rock Island's systemwide termination of operations and total line abandonment which do not warrant further consumption of Rock Island's assets for protection payments to employees whose jobs with Rock Island are no longer in existence by reason of such total abandonment and operational discontinuance. *Montpelier & Barre Railroad Co. Abandonment* (Dkt. No. AB-202F) ____ I.C.C. ____ (1980); *Northampton & Bath Railroad Co. Abandonment*, 354 I.C.C. 784 (1978); *Wellsville, Addison & Galeton Railroad Corp. Abandonment*, 354 I.C.C. 744 (1978); *Tennessee Central Railway Co. Abandonment*, 333 I.C.C. 443 (1968); *Okmulgee Northern Railway Co. Abandonment*, 320 I.C.C. 637 (1964); *Rutland Railway Corp. Abandonment*, 317 I.C.C. 393 (1962), *aff'd sub nom. Brotherhood of Locomotive Engineers* v. *United States*, 217 F. Supp. 98 (N.D. Ohio 1963); *Chicago, Attica & Southern Railroad Co. Abandonment*, 261 I.C.C. 646 (1946), and, that consistent with ICC precedent, with the Rock Island's constitutional right to abandon its lines and discontinue its service, and with the equities of the Rock Island situation, no labor protection arrangements may be imposed on the Rock Island estate; and

The Court being fully advised in the premises,

NOW THEREFORE IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That the total systems abandonment of Rock Island's lines and the discontinuance of all of its rail services and obligations as a common carrier is hereby confirmed and decreed, such abandonment to be consistent, however, with the recommendations of the Interstate Commerce Commission pertaining to the transfer, sale or disposition of track and trackage rights as contained in the report of the Commission dated May 23, 1980; provided, however, that the reasonable period within which the Trustee shall retain the lines designated in Appendix D to the ICC Report shall not exceed 180 days from the date of this Order. That in entering this order, the Court is cognizant that a further order may be required with respect to passenger commuter service pursuant to Section 120 of the Rock Island Transition and Employee Assistance Act.

2. That no claim or arrangement of any kind or nature for employee labor protection payable out of the assets of the Debtor's estate is allowed or required by this Court pursuant to Section 17 of the Milwaukee Railroad Restructuring Act and the Trustee is hereby directed not to pay any such claim or to borrow for such purpose, any and all such claims or arrangements being hereby denied and prohibited by the Court.

Enter

Dated June 2, 1980

/ss/ Frank J. McGarr

U. S. District Judge

APPENDIX C

PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES

The appellees in this case are William M. Gibbons, in his capacity as Trustee of the Chicago, Rock Island and Pacific Railroad Company, The First National Bank of Chicago and Continental Illinois National Bank and Trust Company of Chicago, in their capacities as Indenture Trustees, and Henry Crown et al., substantial holders of first mortgage bonds, income debentures and common stock of the Rock Island. Parent companies, subsidiaries and affiliates of the appellees are as follows:

A. William M. Gibbons, in his capacity as Trustee of the Chicago, Rock Island and Pacific Railroad Company

Affiliates

A&M Ry. Bridge & Terminal Co.
The Belt Ry. Co. of Chicago
Calumet Western Ry. Co.
Denver Union Terminal Ry. Co.
Galveston Terminal Ry. Co.
Great Southwest R. R., Inc.
Houston Belt & Terminal Ry. Co.
Illinois Terminal R. R. Co.
Iowa Transfer Ry. Co.
Joliet Union Depot Co.
Keokuk Union Depot Co.
The Minnesota Transfer Ry. Co.
Oklahoma City Jct. Ry. Co.
Peoria & Bureau Valley R. R. Co.
Peoria Ry. Terminal Co.
Peoria Terminal Company
Pullman Railroad Company

Subsidiaries

Continental International Finance Corporation
Continental Bank International (Texas)
Continental Bank International (Pacific)
Continental Bank International
Conill Bank A.G.
Continental Bank S.A./N.V.
Continental Illinois Bank (Switzerland)
Continental Development Bank, S.A.L.
Underwriters Bank (Overseas) Limited
Continental Illinois Thailand Ltd.

Affiliates

Continental Illinois Leasing Corporation
Continental Illinois Equity Corporation
Continental Illinois Venture Corporation
Republic Realty Mortgage Corporation
Continental Illinois (Canada) Ltd.
Continental Illinois Investment Advisory
Continental Illinois Limited
Continental Illinois International Investment

D. Henry Crown, et al., include the Arie and Ida Crown Memorial, an Illinois not-for-profit corporation, which has no parent, subsidiaries or affiliates.